

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

RETRACTABLE TECHNOLOGIES, INC.
AND THOMAS J. SHAW,

Plaintiff,

-against-

BECTON, DICKINSON AND COMPANY,

Defendant.

Civil Action No. 2:08-cv-16

Chief Judge Leonard Davis

(Jury Trial)

**DEFENDANT BECTON, DICKINSON AND COMPANY'S SUR-REPLY IN RESPONSE
TO PLAINTIFFS' MOTION TO STRIKE ATTACHMENTS TO THE DECLARATION
OF WILLIAM B. MICHAEL FILED IN SUPPORT OF
BECTON, DICKINSON AND COMPANY'S MOTION FOR JUDGMENT AS A
MATTER OF LAW, OR ALTERNATIVELY, FOR NEW TRIAL OR REMITTITUR**

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RTI's reply in support of its motion to strike the attachments to the Declaration of William B. Michael that were filed in support of BD's Motion for Judgment as a Matter of Law, or Alternatively, for New Trial or Remittitur (Doc. 614) refuses to grapple with the real issue.¹

RTI claims "the law in the Fifth Circuit" holds that demonstratives are "*never a part of the record.*" Doc. 614 at 1 (emphasis added). That is false. The two Fifth Circuit cases cited by RTI recognize that demonstratives are not admitted into *evidence*, which is distinct from whether such demonstratives may be part of the *record*. See *United States v. Buck*, 324 F.3d 786, 790-91 (5th Cir. 2003); *United States v. Garcia*, 334 F.App'x 609, 614 (5th Cir. 2009). In this case, the demonstratives were used at trial for a proper purpose -- consistent with Fifth Circuit law -- and they may be filed with the Court and made "a part of the record" for that same purpose.

In its response, BD noted that Professor McCormick praises the practice of including demonstratives in the record to aid review. See 2 McCormick On Evidence § 214 (7th ed. 2013). RTI claims that McCormick reports "the Fifth Circuit does not" share his view, Doc. 614 at 1, but the cited passage in McCormick simply acknowledges that the Fifth Circuit does not treat demonstratives as "admissible exhibits." *Id.* at § 214 & nn.12-13. Again, that is not the purpose for which they are submitted. The McCormick treatise fully supports BD's position.

In the end, RTI can cite only one unpublished district court case for the proposition that demonstratives are "*never a part of the record.*" *Stoker v. Stemco, L.P.*, 2013 WL 3786346, *4 (E.D. Tex. July 17, 2013). In that case, Judge Gilstrap simply denied a *pro se* litigant's motion to compel the production of a demonstrative used by another party for inclusion in the record. That case did not involve the proper use of demonstratives to clarify the testimony introduced during the trial -- the only purpose for which they are used here -- so it is inapposite.

¹ RTI evidently does not believe the reply in support of its motion to strike is subject to the 20-page limit for replies (Doc. 579) because it filed 20 pages of reply briefing on the merits as well as a 1-page reply in support of its motion. If the Court wishes to strike RTI's reply for exceeding the 20-page limit, it is unnecessary to consider this sur-reply. If the Court entertains RTI's reply, it should also entertain this sur-reply.

November 26, 2013

Respectfully submitted,

/s/ Robert A. Atkins

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Certificate of Service

The undersigned hereby certifies that on November 26, 2013, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Robert A. Atkins
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